No. 11905

In the United States Circuit Court of Appeals

For the Ninth Circuit

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Reply Brief

LUCE, FORWARD, LEE & KUNZEL,
1220 San Diego Trust & Savings Building,
San Diego, California,
Attorneys for Appellant San Diego Gas & Electric Company, a corporation.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 11905

Appellant's Reply Brief

REPLY TO APPELLEE'S STATEMENT OF FACTS

Appellee concedes that Appellant's Statement of the Case is correct, except for Appellant's interpretation of the testimony of R. E. Tinkham as to when the witnesses received advice that the accident had occurred. (See Appellee's Brief, p. 4.) This witness testified as follows:

"Q. How long after the plane went out of sight was it that you went down there?

A. I think I was there five minutes at least after it fell; not any more than five minutes. (R., p. 45.)

This testimony obviously refers to the time he arrived at the scene of the accident. Mr. Tinkham's testimony that he was advised of the crash one or two minutes after the plane disappeared into Mission Gorge (R., p. 60), is undisputed.

Appellee states on page 8 of its brief:

"It is argued that the observation of Appellee's aircraft in traveling approximately one mile from the place of the accident establishes that it continued in flight at about the same altitude until it struck the power line of Appellant which was strung at an altitude of 210 feet above the floor of the gorge."

The scene of the accident was variously estimated by Appellant's witnesses to be from 300 to 600 feet from the point at which the airplane disappeared, not a mile. (R., pp. 66, 74, 75.)

REPLY TO APPELLEE'S CONTENTION THAT THE RULE OF RES IPSA LOQUITUR DOES NOT APPLY TO THE FACTS OF THIS CASE.

In discussing the opinion of the California Supreme Court in the case of *Smith v. O'Donnell,* 215 Cal. 714, 12 Pac. (2d) 933, Appellee dwells upon the fact that a passenger-carrier relationship existed in that case. However, the opinion in the Smith case does not evidence any intention on the part of the California Supreme Court to limit the application of the doctrine to such cases. The opinion states (at page 723):

> "The rule has been most frequently applied in common carrier cases where injury has occurred to a passenger . . . "

However, the doctrine is not limited in California to this class of cases. (See Appellant's Opening Brief, pp. 22 and 23, and the authorities there cited.)

Attention is also invited to the case of *Parker v. James E. Granger, Inc.,* 4 Cal. (2d) 668, 52 Pac. (2d) 226. In that case one airplane side-slipped into another, causing both to crash. The California Supreme Court held the doctrine of *res ipsa loquitur* to be applicable, but for the fact that the evidence failed to show that the planes were under the exclusive control

of the pilots employed by the defendant. No suggestion appears in the opinion that the application of the doctrine is in any way conditioned upon the existence of a carrier-passenger relationship.

Appellee cites several cases from other jurisdictions wherein the courts declined to apply the doctrine of *res ipsa loquitur* to airplane cases. In *Towle v. Phillips,* 180 Tenn. 121, 172 S. W. (2d) 807, the holding of the court was based upon the fact that the plane had dual controls and therefore there was no showing that it was under the exclusive control of the defendant. If the cases cited by Appellee can be considered authority for the proposition that the doctrine of *res ipsa loquitur* is, in general, inapplicable to airplane crash cases, they are contrary to the weight of authority and the basic theory behind the doctrine. In any event, as was pointed out in Appellant's Opening Brief, the acceptance by the California courts of the doctrine is binding upon Federal Courts sitting in this state.

Appellee cites *Wallar v. So. Pac. Co.,* 37 F. Supp. 475 (Dist. Ct. N. D. Calif.) on the evidentuary effect of the application of the doctrine of *res ipsa loquitur.* It does not appear that the effect given the doctrine by the state courts was considered in the Wallar case. The state law governs in this regard, and in California the

inference of negligence arising from the application of the doctrine requires a judgment in favor of the plaintiff in the absence of rebutting evidence. (See Appellant's Opening Brief, pp. 23, 24, and the authorities there cited.)

REPLY TO APPELLEE'S CONTENTION THAT NEGLIGENT OPERATION OF APPELLEE'S AIRPLANE WAS NOT ESTABLISHED.

In connection with the height at which the airplane was flying immediately prior to the accident, Appellee invokes the presumption that the law has been obeyed, contained in Section 1963 (33) of the California Code of Civil Procedure. Such disputable presumptions cannot be permitted to stand in the face of uncontradicted evidence to the contrary.

> *Larrabee v. Western Pac. Ry. Co.,* 173 Cal. 743, 747; 161 Pac. 750;
>
> *Savings & Loan Soc. v. Burnett,* 106 Cal. 514, 529; 39 Pac. 922.

In *Savings & Loan Soc. v. Burnett, supra,* the Court Court said (on page 747):

> "But disputable inferences or presumptions, while evidence, are evidence the weakest and least satis-

> factory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."

More applicable to the case at bar would appear to be the disputable presumption contained in Section 1963 (28) of the California Code of Civil Procedure:

> "That things have happened according to the ordinary course of nature and the ordinary habits of life."

Appellee quotes the remarks of the District Court which appear to deny Appellant the right to recover in the absence of eye-witnesses to the actual impact. However, no authority is cited supporting such a requirement, and, as was pointed out in Appellant's Opening Brief, the law does not impose such a requirement.

Attention is further respectfully invited to the testimony of Appellant's witnesses that after the airplane disappeared into Mission Gorge they continued to look in the direction of the gorge and that at no time did the airplane rise out of the gorge prior to the accident. (R., pp. 58, 59, 75.)

In view of the foregoing evidence, the distance and the time element involved, it is submitted that the only

conclusion that may reasonably be drawn is that the plane maintained its prior course until the impact, and that the accident was caused by the negligent manner in which Appellee's airplane was operated. The facts being undisputed, the conclusions to be drawn therefrom are for the Appellate Court upon review of the trial court's action. (See Appellant's Opening Brief, p. 16 and the authorities there cited.)

CONCLUSION

It is respectfully submitted that Appellee's position is not supported by its analysis of the case and authorities cited and that the judgment should be reversed.

Respectfully submitted,

LUCE, FORWARD, LEE & KUNZEL,

By JAMES L. FOCHT JR.,

Attorneys for Appellant, San Diego Gas & Electric Company a corporation.